

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 08-1076

MELISSA CAROL THETFORD
APPELLANT

V.

ELECTRIC COWBOY, INC.; FREMONT
COMPENSATION; and DEATH &
PERMANENT TOTAL DISABILITY
TRUST FUND

APPELLEES

Opinion Delivered June 17, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. E910613]

AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

M. MICHAEL KINARD, Judge

On May 1, 1999, Melissa Carol Thetford injured her back while working as a bartender at appellee-employer Electric Cowboy, Inc.¹ In a previous appeal to this court, Thetford argued that the Workers' Compensation Commission erred in finding, among other things, that she was not permanently totally disabled (PTD), that she was not entitled to wage-loss disability benefits in excess of her permanent anatomical disability rating, and that she failed to participate in and cooperate with rehabilitation and job placement assistance without reasonable cause. In an unpublished opinion, this court remanded the case for the Commission to make specific findings as to what effect, if any,

¹ The compensability of appellant's injury was litigated before an ALJ in March 2000. The ALJ found Thetford's back injury to be compensable and awarded temporary total disability benefits from September 5, 1999, to a date yet to be determined. The Commission affirmed, and the respondents then appealed to this court, which also affirmed. See *Electric Cowboy, Inc. v. Thetford*, CA 01-812 (January 30, 2002).

Thetford's use of pain medication has on her ability to work. *Thetford v. Electric Cowboy, Inc.*, CA 07-716 (March 12, 2008). The Commission was also directed to make specific findings of fact regarding Thetford's continued need for such treatment.

On remand, the Commission again affirmed the administrative law judge (ALJ), finding that the claimant proved she was entitled to continued medical treatment, including medication prescribed by Dr. Tracy; that she was barred from receiving wage-loss benefits; that her use of pain medication did not affect her ability to return to suitable work within the claimant's physical restrictions; that the respondents proved that the claimant refused to participate in a program of vocational rehabilitation and job-placement assistance; that the claimant's failure to participate was without reasonable cause; and that the claimant's use of pain medication did not constitute reasonable cause for her refusal to participate in vocational rehabilitation and job placement assistance.

Appellant now argues on appeal that there is no substantial evidence that (1) she does not need continuing narcotic pain medication; (2) the effect of her pain and the narcotic pain medication is that she is not PTD. We affirm.

The facts are these. Appellant has had three back surgeries (in October 1999, April 2000, and January 2003) as a result of her compensable injury. She was assigned a 14% anatomical impairment rating in February 2002 and an additional permanent impairment rating of 5% in November 2003. At the time of the hearing before the ALJ in January 2006, appellees had accepted and paid a permanent impairment rating of 19% to

the body as a whole. The evidence introduced at the hearing included the testimony of appellant regarding her level of pain, her medications, and her limitations and abilities as to physical activity. Edie Nichols, a vocational rehabilitation counselor, testified that based on her interview with appellant, appellant's functional capacity evaluation (FCE), and her transferable skills analysis, she reported that appellant could work in some capacity and would broaden her options with retraining. After appellant expressed an interest in bookkeeping, Nichols offered to talk with a community college about accommodations, but appellant never indicated any interest in pursuing college. Nichols stated that appellant never followed up with any of her offers of assistance or with the specific job opportunities that she had found in appellant's area. An affidavit by Robert White stated that he had, upon appellant's attorney's request for vocational consultative services, attempted to contact appellant by telephone on six to seven occasions and left messages. Appellant had not responded to any of his messages, and White stated that he would not be involved with her case.

Dr. Tracy, appellant's primary physician since October 2003, testified at a deposition that he believed appellant to be unable to work in any capacity. However, a January 2004 FCE showed appellant to be capable of performing work in the light category.² Upon seeing appellant in January 2005 with complaints of back and left leg

² Appellant argues that a July 2004 FCE, which found her to be capable of sedentary work, should be considered more reliable "because it was later in time." However, the ALJ, who was affirmed by the Commission, excluded both this FCE and the testimony of Janet Levasseur, who administered the FCE. Because appellant does not argue the merits of this evidentiary ruling, we do not consider this July 2004 FCE.

pain, Dr. Saer, who had performed appellant's third surgery, recommended additional testing. After the testing revealed no significant changes from appellant's prior study, Dr. Saer stated that he was "reluctant to declare her totally and permanently disabled."

The ALJ found, among other things, that appellant failed to prove by a preponderance of the evidence that she was unable because of her compensable injury to earn any meaningful wages in the same or other employment; that appellant has therefore failed to prove by a preponderance of the evidence that she is permanently totally disabled; that appellees proved by a preponderance of the evidence that appellant without reasonable cause refused to participate in or cooperate with rehabilitation and job placement assistance; that appellant is therefore barred from receiving wage-loss disability benefits in excess of her permanent anatomical impairments; and that appellant proved that she was entitled to continued reasonably necessary medical treatment.

Our standard of review in workers' compensation cases is well settled. In reviewing decisions from the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same

facts before them could not have reached the conclusions arrived at by the Commission. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

Permanent Total Disability

Appellant contends that there is no substantial evidence that (1) she does not need continuing narcotic pain medication; (2) the effect of her pain and the narcotic pain medication is that she is not permanently totally disabled (PTD).³ Appellant's points on appeal and several statements in her brief expose a fundamental problem with her arguments: It was appellant's burden to prove her alleged disability—not appellees' burden to prove she was *not* disabled. "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002). The burden of proof is on the employee to prove inability to earn any meaningful wage in the same or other employment. *See* Ark. Code Ann. § 11-9-519(e)(2). Appellant urges this court to "simply reverse and render that it is a non-sequitur to hold that the appellant is not PTD." We decline to do so. The fact that appellant is on pain medication does not necessarily mean that she is incapable of working in any capacity. Keeping in mind our substantial-evidence standard of review, we affirm the Commission's findings.

The Commission found that appellant's use of pain medication has not restricted her from returning to suitable work within her physical restrictions. In discussing this

³ The Commission does not directly address PTD in its opinion. However, it stands to reason that if the Commission found no wage-loss disability, there was no PTD.

finding, the Commission pointed to the following factors: appellant was able to perform some limited work after her compensable injury; the results of a functional capacity evaluation (FCE) in January 2004 indicated that she could safely perform light work for an eight-hour day with restrictions; appellant did not cooperate with the vocational rehabilitation services offered to her. The Commission found that appellees proved that appellant's refusal to cooperate was without reasonable cause. Thus, under Ark. Code Ann. § 11-9-505 (Repl. 2002), appellant is expressly precluded from receiving permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.⁴

The Commission found the case of *Whitlatch v. Southland Land & Development*, 84 Ark. App. 399, 141 S.W.3d 916 (2004), to be distinguishable from the case at hand. We agree. In *Whitlatch*, this court reversed, holding that substantial evidence failed to support the Commission's decision that the claimant failed to prove PTD. The claimant's situation in *Whitlatch* is distinguishable in that the conclusion of the doctor performing Whitlatch's FCE was that he was totally and permanently disabled, and unable to perform any work-related activities on a sustained basis. Additionally, Bob White, a vocational

⁴ Arkansas Code Annotated § 11-9-505(b)(3) provides:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

expert, reported that Whitlatch was “not a candidate for any type of employment and is unable to physically and mentally meet the demands of sedentary work.” In this case, Thetford’s FCE revealed that she was capable of light duty work, and she refused to cooperate with attempts at vocational rehabilitation. One doctor, Dr. Tracy, testified that appellant is totally permanently disabled, but the Commission expressly stated that it attached “minimal weight” to his opinion.

Based on the foregoing, we affirm the Commission’s denial of PTD benefits in this case.⁵

Cross-Appeal

On cross-appeal, Electric Cowboy, Inc., argues that substantial evidence does not support the Commission’s award of additional medical benefits. Employers are required to promptly provide for injured employees such medical services and medicine as may be reasonably necessary in connection with the injury received by the employee. *See* Ark. Code Ann. § 11-9-508(a) (Supp. 2007). What constitutes reasonable and necessary treatment of an injured employee for workers’ compensation purposes is a question of fact for the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996). A claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant’s injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004).

⁵ We note that appellant does not make an alternative argument that this court should reverse on the denial of wage-loss benefits in the event we affirm on PTD.

Electric Cowboy argues that Dr. Tracy's opinion that appellant had a continuing need for pain medication is based on appellant's subjective complaints of pain; that Dr. Saer had warned against continuing appellant's narcotic and muscle relaxant prescriptions indefinitely; and, most importantly, Dr. Tracy could not causally relate the need for such medication to the compensable injury without resorting to speculation and conjecture. In explaining its finding that appellant was entitled to continued medical treatment "including management of her prescription medication," the Commission wrote:

Dr. Tracy in the present matter has opined that the claimant is "on [an] appropriate medical regimen." We recognize that Dr. Saer expressed concern about the claimant's usage of narcotic prescription medication. However, Dr. Saer noted in March 2005 that Dr. Tracy was managing the claimant's medication and recommended an evaluation by Dr. Krishnan. Dr. Krishnan subsequently declined to evaluate the claimant's usage of medication. There are currently no medical opinions of record which directly contradict Dr. Tracy's opinion.

Electric Cowboy's arguments go to the weight to be given the evidence—a matter for the Commission, not this court. Because substantial evidence supports the award of additional medical benefits to appellant, we affirm on cross-appeal.

Affirmed on direct appeal; affirmed on cross-appeal.

VAUGHT, C.J., and ROBBINS, J., agree.